NO. 84369-4

SUPREME COURT OF THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,

Petitioners,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, et al., (No. 82399-5)

and

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)

Respondents.

Consolidated on Appeal

STATE'S ANSWER IN OPPOSITION TO PETITION FOR REVIEW TO STATE SUPREME COURT

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I. IDENTITY OF RESPONDENTS

The State of Washington, acting through the Washington State Parks and Recreation Commission (State Parks) and the Washington State Department of Transportation (WSDOT), are Respondents at all stages of the proceedings below. The State requests that the Petition for Review be denied because it does not articulate a sufficient basis for review under RAP 13.4(b).

II. COUNTERSTATEMENT OF THE ISSUE

Did the court of appeals properly limit review of a land use permit allowing State Parks to build a specific trail over specific property to the standards set forth in the Land Use Petition Act (LUPA), RCW 36.70C, when the comprehensive plan policies authorized such trails, the subarea comprehensive plan specifically encouraged extending this trail and existing zoning ordinances provided the mechanism to review, condition, and permit the trail?

III. COUNTERSTATEMENT OF THE CASE

This case involves an application submitted by State Parks to Douglas County for construction of a public, non-motorized transportation facility that will run along the Columbia River between Odabashian Bridge in Wenatchee north to Lincoln Rock State Park. AR at 5102. The project will run approximately 5.1 miles over land owned by the WSDOT and the

local Public Utilities District, most of which is within 200 to 400 feet of the river. AR at 5102, 5088. It is intended in part to provide an alternative transportation route to Lincoln Rock State Park for pedestrians and bicyclists, who might otherwise be forced to use State Route 2/97. AR at 3036-38. It will also provide recreational access to the river consistent with the county shoreline master program. AR at 2616. It runs through several land-use zones, including areas currently used to grow fruit trees on land leased from public entities. AR at 5088.

This project has had a long procedural history. In 2004, the hearing examiner approved a shoreline substantial development permit for this project. AR at 5102. That decision was affirmed by the State Shorelines Hearings Board. AR at 5102. The superior court affirmed the decision on the substantial development permit but directed State Parks to apply for a land-use permit under existing county land-use regulations as well. AR at 5103, 5631.

State Parks complied with the court's direction and applied for a recreational overlay permit in 2006, as authorized in Douglas County's development regulations under DCC 18.46. AR at 5103. The hearing examiner held a hearing and approved the project permit. AR at 5113. The hearing examiner's decision was appealed to superior court. The court held that this project involved a specific area owned by specific parties requesting

a specific use (AR at 5666), but remanded the matter to be decided by the Board of County Commissioners (Commissioners), instead of a hearings examiner. AR at 5661-66.

Over 1500 people signed petitions supporting the project, which were submitted to the Commissioners. AR at 4509-4713. The Commissioners unanimously approved the project in 2008. During this process, county staff twice analyzed the project for consistency with county law. AR at 2614, 5087. A NEPA[1] environmental assessment had already been performed by the Federal Highway Administration. AR at 3151. The county imposed conditions to mitigate potential impacts to surrounding fruit tree operations, including the following: buffers, fencing, security, closure times to allow helicopter spraying and bee activity, and design changes to prevent frost pockets. AR at 5132-43. The merits of those conditions were debated at length. Over 6000 documents now make up the record for this appeal.

The Petitioners herein filed two appeals challenging the Commissioners' decision: an appeal to the superior court under LUPA, and an appeal under the Growth Management Act (GMA), chapter 36.70A, to the Eastern Washington Growth Management Hearings Board (EWGMHB).

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[1] National Environmental Policy Act of 1969, as amended. 42 U.S.C. §§ 4321-75.

In the LUPA appeal, the superior court affirmed the Commissioners' decision and dismissed the LUPA petition. The court held that the Petitioners failed to prove that the county decision was not supported by substantial evidence in light of the entire record, failed to show there was an erroneous interpretation of law, failed to show there was a clearly erroneous application of law, failed to show that the county followed unlawful procedures, and failed to show that the project had changed in anyway since the original State Environmental Policy Act (SEPA) review was challenged and affirmed in a prior lawsuit. 43 CP at 8374-78; 20 AR at 0-3663 (Sept. 13, 2005).

The EWGMHB held that the Commissioners' decision involved a project permit as defined under RCW 36.70B.020(4), subject to review only under LUPA; the EWGMHB therefore lacked jurisdiction to hear the appeal under the GMA. The EWGMHB also noted that the Petitioners had never appealed the zoning law that authorized the Commissioners' decision and thus were foreclosed from challenging it under the GMA. Accordingly, the EWGMHB dismissed the petition for review.

The Petitioners appealed the EWGMHB order to the superior court, which affirmed the EWGMHB order. The superior court agreed that the Commissioners' decision was a project permit, subject only to review under LUPA.

The Petitioners sought direct review of both superior court rulings. This Court denied direct review and instead consolidated the appeals and transferred the case to Division III of the Court of Appeals, which affirmed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners allege that the court of appeals' decision merits review under three criteria in RAP 13.4(b): (1) conflict with a Supreme Court decision; (2) a significant question of constitutional law; and (3) an issue of substantial public interest.

A. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court

Petitioners allege that the court of appeals' decision conflicts with the prior Supreme Court ruling in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000). To the contrary, the court of appeals' decision acknowledged *King County v. Central Puget Sound Growth Management Hearings Board*, but deemed it not applicable because that case dealt specifically with a challenge to the adoption of amendments to development regulations within the time frames required under the GMA. By contrast, the Petitioners here challenged neither the applicable comprehensive plans nor the development regulations that authorized this trail permit. Instead, they attempt to collaterally attack the existing plans and zoning regulations

in this LUPA challenge. The Court in *Woods v. Kittitas County,* 162 Wn.2d 597, 614, 174 P.3d 25 (2007), expressly held that such disguised collateral attacks are not authorized under LUPA.

Petitioners' claim also fails because neither the EWGMHB nor the superior court in this case had jurisdiction to consider whether the project permit at issue complied with the GMA. Under *Woods* and the GMA, only the Growth Management Hearings Board has jurisdiction to hear a challenge alleging that an amendment to the general land use laws, whether the comprehensive plan or zoning regulations, complied with the GMA. The Growth Management Hearings Board loses jurisdiction if the zoning regulation is not appealed within 60 days. Under *Woods* and LUPA, the superior court has jurisdiction to evaluate whether a project permit such as at issue here complied with the standards set forth under LUPA. The superior court lacks jurisdiction in a LUPA appeal to analyze a project permit decision for compliance with the GMA.

Both the EWGMHB and superior court held that this recreational overlay was a project permit as defined under RCW 36.70B.020(4). It is a project permit because the recreational overlay was authorized by the comprehensive plan policies, the recreational overlay was formally adopted as a zoning regulation, the recreational overlay did not change the underlying zoning, the recreational overlay only allowed additional uses

within the existing zones, and the permit was requested by specific parties for a specific authorized use affecting only a specific narrow track of land.

Despite the legislative limits on jurisdiction mentioned above, Petitioners ask this Court to determine if the permit conflicts with the requirements of the GMA because the specific zoning regulation mechanism—the Recreational Overlay—was not expressly mentioned in the comprehensive plan. The Court in *Woods v. Kittitas County*, however, made it clear that comprehensive plans are general policy documents. *Woods v. Kittitas Cy.*, 162 Wn.2d at 613. The specific mechanism by which the plan policies will be implemented come after the plan is adopted in the form of development regulations. *Id.*

The court of appeals considered Petitioners' argument but accepted this Court's ruling in *Woods* that properly characterized the above approach to land use under the GMA. *See* COA Decision at 8-9. The court of appeals recited many comprehensive plan policies that supported the recreational, transportation, and shoreline features of this project. COA Decision at 8. The court of appeals further found that the zoning mechanism at issue—the Recreational Overlay—did not change the underlying zoning as alleged by Petitioners. The Recreational Overlay simply authorized a specific use for recreation within the underlying zones. COA Decision at 10. In this case, several land-use zones were

affected, including areas currently used to grow fruit trees on land leased from public entities. AR at 5088. The regulatory mechanism implemented the plan policies by providing a process to approve and condition specific project permits.

Based on the general policies of the comprehensive plan supporting the trail, the specific direction in the subarea plan to extend the trail, and the authority created by the existing zoning ordinance to review, condition, and permit the trail in any zone where it was not expressly prohibited, the court of appeals ruled that this land use decision was reviewable exclusively under the LUPA as a project permit.

The court of appeals also found that the time to challenge the zoning regulation had passed, and as a result any such collateral attack was now time barred. Petitioners contend that their collateral attack should be allowed because any appeal of the comprehensive plan or zoning ordinance could not be timely reviewed until applied to specific tracts of land. Contradicting their allegation, Petitioners acknowledge that this particular trail had been under review since 2000. Petition for Review (Pet.) at 4. Petitioners also admit that the amendment to the subarea plan that encouraged the trail—"The current trail system should be increased to extend north to connect with Lincoln Rock State Park"—was adopted in 2006 (Pet. at 5); yet, the

Petitioners failed to appeal that 2006 amendment to the Growth Management Hearings Board within a timely manner.

Petitioners suggest that *King County v. Central Puget Sound Growth Management Hearings Board* leaves no room for discretion when regulating designated agricultural lands. To the contrary, in *King County*, the Court analyzed the impact of a zoning ordinance that had been amended and appealed under the GMA in a timely manner. The Court held that, under the facts of that case, balancing the recreational goal with the natural resource goal favored the conservation of the designated agricultural land. As a result, the Court held that natural resource goal should prevail over the recreational goal.

Contrast the instant case in which the county balanced four GMA goals in developing the recreational overlay ordinance: (1) the need for public safety under the transportation goal by taking pedestrians and cyclist off a state route; (2) the importance of providing public access to the Columbia River under the shoreline management goal, (3) the need for recreational opportunities under the recreation goal; and (4) the need to conserve agricultural resource lands. Significantly, the shoreline management goal is so important that the legislature enacted a special section of the GMA to ensure that the Shoreline Management Act (SMA)

would be properly considered in planning and that the SMA would become an element of the comprehensive plan. RCW 36.70A.480.

The court of appeals correctly held that *Woods v. Kittitas County* controlled and a collateral attack was barred. COA Decision at 12. Accordingly, no conflict with Supreme Court precedent exists to warrant review under RAP 13.4(b)(1).

B. The Recreational Overlay Regulation Is Not Unconstitutional

Petitioners allege that the county's comprehensive plan and zoning regulation that authorizes recreational overlays (DCC 18.46) violated article XI, section 11 of the Washington Constitution ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with the general laws."). Article XI, section 11 is a broad grant of authority to the county. Local laws are presumed constitutional, and a petitioner has a heavy burden of proving invalidity beyond a reasonable doubt. *City of Bellevue v. State*, 92 Wn.2d 717, 720, 600 P.2d 1268 (1979). Whether a local law conflicts with a general law is purely a question of law to be reviewed de novo. *Weden v. San Juan Cy.,* 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

The crux of Petitioners' argument is that the recreational overlay regulation as applied to this permit application conflicts with

RCW 36.70A.177. A law is unconstitutional if the general law "preempts the field, leaving no room for concurrent jurisdiction," or "if a conflict exists such that the two [laws] cannot be harmonized." *Weden*, 135 Wn.2d at 693. Two laws will not conflict unless the local law permits what is forbidden by state law or prohibits what state law permits. *Parkland Light & Water Co. v. Tacoma-Pierce Cy. Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). Where two interpretations are possible, the interpretation that sustains the constitutionality of the law will be adopted. *City of Spokane v. Vaux*, 83 Wn.2d 126, 129-30, 516 P.2d 209 (1973).

There is no conflict between this county's recreational overlay regulation and RCW 36.70A.177. First, under the GMA, local laws adopted under the Act are valid if not appealed within 60 days. RCW 36.70A.290, .320; *Thurston Cy. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 344, 189 P.3d 38 (2008); *Wenatchee Sportsmen Ass'n v. Chelan Cy.*, 141 Wn.2d 169,182, 4 P.3d 123 (2000); *see also Woods*, 162 Wn.2d at 614. Petitioners never challenged DCC 18.46 under the 60-day requirement; that regulation is valid under the GMA.

Second, the GMA is a flexible planning code that required the county to adopt development regulations to assure the conservation of

designated resource lands. RCW 36.70A.060. The county met the mandatory GMA element by adopting the various natural resource ordinances. The GMA, however, gives each planning entity the flexibility to decide under the circumstances of each area how best to fulfill the various goals. *See Woods*, 162 Wn.2d at 613 ("the GMA indirectly regulates local land use decisions through comprehensive plans and development regulations . . .").

This flexible approach was acknowledged by the court of appeals in this case. The court of appeals emphasized that the "GMA states that a county or city *may* use innovative techniques to conserve agricultural lands." COA Decision at 23. The court of appeals emphasized that the GMA guides the counties through the GMA planning goals. The GMA does not actually prohibit non-agricultural uses in designated areas of good soil. Furthermore, as pointed out by the court of appeals, any potential impacts could be and were conditioned by the permit process to address the impacts. COA Decision at 23.

People can disagree on how best to plan for growth. That is the nature of land-use planning. The GMA lays out a scheme to guide the planning process, imposing both substantive and procedural requirements to ensure broad public participation and a meaningful result. The GMA also provides, however, that once the process is done, the comprehensive

plan or development regulations, or amendments thereto, are presumed valid and compliant with the GMA absent a successful challenge to the Growth Management Hearings Board. RCW 36.70A.320.

Petitioners' untimely allegations of noncompliance with the GMA are insufficient to raise any significant question of constitutional law that would merit review under RAP 13.4(b)(3).

C. Petitioners Fail To Demonstrate That A Substantial Public Interest Is At Stake

Finally, Petitioners claim that two issues demonstrate a substantial public interest under RAP 13.4(b)(4): the adequacy of environmental review and attorney fees.

1. Adequacy Of Environmental Review

Petitioners attempt to revive a claim that has already been litigated to finality: that the State Environmental Policy Act (SEPA), RCW 43.21C, was not followed. Petitioners acknowledge the project was analyzed under the National Environmental Policy Act (NEPA). Pet. at 4. The environmental assessment included an analysis of the impact of the project on adjacent farmland. 25 AR at 0-4694. The Federal Highway Administration, lead agency for the NEPA analysis, made a finding of no significant impact. 25 AR at 0-4744. As explicitly authorized in the SEPA Rules, at WAC 197-11-610, State Parks adopted the NEPA

documents and issued its own determination of non-significance. 24 AR at 0-4546.

Petitioners now allege that SEPA review was inadequate on a theory that State Parks failed to study alternative uses of resources. To the contrary, State Parks considered alternatives in the early planning and design phase of the project. 17 AR at 0-3106, 3108-35. One alternative route was closer to the Columbia River, but it would have required acquiring land in private ownership and some of the private landowners were unwilling to sell. 17 AR at 0-3106, 3108-35. Another alternative route was along Highway 2/97, but it did not meet the need to provide a multi-modal transportation alternative to Highway 2/97 and to increase recreational opportunities along the Columbia River. *Id.* The specific impacts to agricultural land were addressed in the NEPA/SEPA documents, and the permit was conditioned to limit such impacts.

In a prior appeal of the substantial development permit issued for the trail, the superior court held that the SEPA decision was proper and no further review was necessary absent changes that result in a significant environmental impact.

> Consistent with this court's decision in the companion appeal of the Shoreline Hearings Board's decision upholding issuance of the Shoreline Substantial Development Permit, no further review is necessary under the State Environmental Policy Act unless there are

> changes to the proposed project that would result in probable significant adverse environmental impacts.

20 AR at 0-3663 (Sept. 13, 2005).

The court of appeals agreed that no further review under SEPA was warranted because the project had not changed. COA Decision at 20. It is not enough for Petitioners to allege at this date that they believe that there are unresolved conflicts. Petitioners have had their day in court on SEPA and lost.

2. Attorney Fees

In an attempt to avoid liability for attorney fees, Petitioners allege that the court of appeals improperly construed RCW 4.84.370. The statute governs attorney fees for appeals of land use decisions and provides that "reasonable attorney fees . . . shall be awarded to the prevailing party . . . on appeal before the court of appeals or the supreme court of ***a*** decision by the county . . . ." (Emphasis added.) The statute further requires that the prevailing party have also prevailed before the county ***and*** in superior court. RCW 4.84.370(1)(a),(b). The court of appeals properly applied RCW 4.84.370 only to the litigation challenging the permit approval by the Board of County Commissioners, not to prior litigation involving this multi-permitted project. COA Decision at 24.

Petitioners suggest that RCW 4.84.370 should be interpreted as requiring that *any* loss on *any* lawsuit involving a project disqualify a party from attorney fees, no matter how remote that loss may be from the present litigation. Their argument ignores the language of the statute. RCW 4.84.370 states that the prevailing party is entitled to attorney fees on ***a*** county decision. The statute does not say *all* decisions on a project. Some projects may require multiple permits, as was the case here. Petitioners' interpretation that a project proponent must prevail on *all* permit decisions involved in the project to warrant attorney fees for prevailing on *a* specific decision would encourage challenges with impunity if a party prevailed on any issue during the course a project. RCW 4.84.370 was enacted to deter such appeals, not encourage them.

Such an interpretation also would create two untenable alternatives: either (1) it would be impossible at the conclusion on any given lawsuit (or appeal) to determine whether attorney fees should be awarded because the court does not know whether there will be another lawsuit coming that might make the prevailing party no longer a prevailing party; or (2) a prevailing party that received attorney fees in prior litigation would be forced to return them months or years later if they lost in separate litigation related to the same project.

Petitioners' interpretation is not related to any substantial public purpose and is too strained to warrant review under RAP 13.4(b)(3).

D. The State Is Entitled To Attorney Fees

If the Petition for Review is denied, the State should be awarded reasonable attorney fees for filing this answer. RAP 18.1(j).

V. CONCLUSION

All of the issues raised by Petitioners in their Petition for Review were thoroughly considered and addressed by the court of appeals in its decision. The Petitioners have failed to establish that this case conflicts with a prior decision of the Supreme Court, involves a significant constitutional question of law, or involves a matter of substantial public interest. This Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 16th day of April 2010.

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